indorsement was forged and the instrument came into B's hands. B had negotiated for value, being without knowledge of any irregularity. But he had committed a technical conversion, having constructive notice. The payee waived the tort and recovered in indebitatus assumpsit. In that case the defendant was morally guiltless; in ours he was conscious of his unjust enrichment. In that, the plaintiff might have had recourse to his original debtor on the original contract, and also to the tort-feasor; in this, the corporation has recourse only against its treasurer, the tort-feasor.[9]

It is not necessary that the corporation should have been forced to meet the obligation before suit brought, for, in determining the measure of damages in an action, the plaintiff may show that he is under a liability to pay to another, as a result of the defendant's breach of duty, although he has not yet paid.[10]

It is submitted that a defrauded party may recover in an action of indebitatus assumpsit from anyone claiming under the defrauder and having notice of the fraud, if such person has negotiated the instrument to a bona fide purchaser for value.

## SALE OF INTOXICATING LIQUORS BY A BONA FIDE SOCIAL CLUB WITHOUT A LICENSE.

There has been a great conflict in the cases on this subject in the past. Recently two more cases have been added to the already large number.[1] The first case deals with an unincor-

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[9] If the corporation waives his tort and recovers from him in assumpsit, of course it may not recover from the creditor. *Security Co. v. Amer. Exch. Nat'l Bank,* 103 N. Y. Supp. 399.

[10] *Josling v. Irvine,* 6 H. & N. 512. (Liability arose because of plaintiff's inability to deliver goods, due to defendant's breach of contract.) *Randall v. Raper,* E. B. & E. 84. (Plaintiff's vendee claims compensation from plaintiff on a warranty. Defendant sold to plaintiff on same warranty.) *Spark v. Heslop,* 1 E. & E. 563. (Defendant agreed to answer to plaintiff for all expenses undergone in maintaining a certain suit. *Held,* plaintiff may recover the amount of his attorney's bill, which has been rendered, but not paid.) *Richardson v. Chasen,* 10 Q. B. 756. (Action for breach of agreement to assign a lease. Plaintiff recovers the bill of costs due his attorney for investigating the title, though such bill was not paid before action was brought.)

[1] *Gevinis v. State,* 107 N. E. (Ind.) 78; and *Commonwealth v. Woelz,* 106 N. E. (Mass.) 560.

porated club, and the second with an incorporated club. Both hold that the transfer of liquor by the club to a member constitutes an illegal sale and is a misdemeanor.

The facts of the first case are briefly these: the club was a social order, unincorporated, having rooms and equipment. Appellant was steward, having charge of the liquors, which had been purchased with club money. The plan of disposing of the liquor was to sell tickets or coupons (to lodge members only) which were good in exchange for definite quantities of liquor. There was no profit and the club had a select membership. The court held that when the liquor was purchased it belonged to the club members in common, and when a member received a definite portion, it belonged to him and that this constituted a sale within the meaning of the Statute forbidding sales without a license.

The second case differed from the first only in the fact that the club was incorporated. "In the present case the beer was owned not by the members but by the corporation, which is a distinct legal entity. . . . He (member) had no individual right or interest in the liquors owned by the corporation. In short, the transaction discloses the transfer of property from one person to another for a consideration of value, or a 'sale' in the ordinary meaning of the word."

Are these two cases right? On the first question, where the club is unincorporated, the decisions and courts are in hopeless conflict as to whether the transaction is a sale. The courts of Massachusetts have held that such a transaction is not a sale, but that it is merely a method of distributing common property.[2] So have the courts of other states.[3] Is this view sound? Whose property is it when it is purchased with the club funds? It is the property of all in common? Each one has as much right to it as the next member. When the liquor is drawn off, and the member passes over his coupon or money, the title to the property has changed, from an undivided interest with the other members to an absolute ownership of the amount in question. This transaction contains all the elements of sale, call it what

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[2] *Com. v. Smith,* 102 Mass. 144; *Com. v. Pomphret,* 137 Mass. 564.

[3] *Barden v. Montana Club,* 10 Mont. 330; *Graff v. Evans,* 8 Q. B. 373; *Davies v. Bennett,* 1 K. B. 666; *Klein v. Livingston,* 177 Pa. 224; *Leim v. State,* 55 Md. 566; *People v. Adelphi Club,* 149 N. Y. 5; *State v. McMaster,* 35 S. C. 1.

you will.[4] "Each received liquor which mostly belonged to others and in which he had a minute undivided interest. For his money he received in exchange liquor which belonged to several others as well as to himself and converted it to his sole and separate use. This is surely a sale."[5] To say that the liquor when bought belonged to all in common and by a transaction which vests the title free from the interests of all others, therein is not sold would be flying right in the face of what the community regards as a sale and what the very ones who receive the liquor at the club regard as a sale. "I content myself with saying briefly, that I agree with the general opinion of the community."[6]

Now let us consider the attitude of the courts when the club is an incorporated one. By far the great weight of authority, and reason, consider such a transaction a sale.[7] The legal title to the liquor, purchased with the corporate funds, is in the corporation. By the transaction, the title is vested in the individual. This certainly contains all the elements of a sale. "An

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[4] *People v. Law & Order Club,* 203 Ill. 127; *Mannont v. State,* 48 Ind. 21, *semble; Martin v. State,* 59 Ala. 34; *Russel v. State,* 116 Pac. (Wyo.) 451; *Nogales Club v. State,* 69 Miss. 218; *People v. Bradley,* 58 Hun 601, *semble; U. S. v. Alexis Club,* 98 Fed. 725; *State v. Neis,* 108 N. C. 787; *Manning v. City of Canon City,* 45 Colo. 571.

[5] *State v. Neis,* 108 N. C. 787.

[6] McPherson, J., in *U. S. v. Alexis,* 98 Fed. 725.

[7] *Martin v. State,* 59 Ala. 34; *Newark v. Essex Club,* 53 N. J. L. 99; *State v. Lockyear,* 95 N. C. 633; *County v. Boise Club,* 20 Idaho 421; *United States v. Alexis Club,* 98 Fed. 725; *Country Club v. People,* 228 Ill. 75; *People v. Soule,* 74 Mich. 205; *State v. Robinson,* 163 Mo. App. 221; *Cuzner v. California Club,* 100 Pac. (Cal.) 868 (holding that the statute does not apply to clubs who do not sell as a business); *City of Spokane v. Banighman,* 54 Wash. 315; *State v. Klein,* 93 Pac. (Ore.) 237; *State v. Mudie,* 115 N. W. (S. Dak.) 107; *Beauvoir Club v. State,* 42 So. (Ala.) 1040; *State v. Honcek,* 41 Kans. 87; *State v. Shumate,* 44 W. Va. 490; *Commonwealth v. Woelz,* 106 N. E. (Mass.) 560; *Mohrman v. State,* 105 Ga. 709; *State v. Maryland Club,* 105 Md. 585; *So. Shore Country Club v. People,* 228 Ill. 75; *State v. Minnesota Club,* 106 Minn. 515; *Chesapeake Club v. State,* 63 Md. 446; *University Club v. City of Louisville,* 7 Ky. Law Rep. 902; *Hermitage Club v. Shelton,* 104 Tenn. 101; Army and Navy Club, 8 App. D. C. 544. Contra, *Graff v. Evans,* 8 Q. B. D. 373; *Davies v. Bennett,* (1902) 1 K. B. 666; *People v. Adelphi Club,* 149 N. Y. 5; *Klein v. Livingston,* 177 Pa. 204; *Piedmont Club v. Commonwealth,* 87 Va. 541; *State v. Austin Club,* 89 Tex. 20; *Barden v. Montana Club,* 10 Mont. 330; *State v. McMaster,* 35 S. C. 1. Black on Intoxicating Liquors, Sec. 142.

essential difference between a corporation and a partnership is that the corporators have no legal title or interest in the corporate property, while the real and personal estate of the partnership is held by the partners. Shareholders are not tenants in common or co-owners of the property of the corporation in any sense; but the title thereto rests in the legal entity, called the 'corporation.'"[8]

On the other hand, the following is the basis of the view that it is not a sale. "The society is not a trading corporation but a voluntary association for social purposes. Each member is elected and each is a joint owner of all the corporate property and assets. Liquors are not *sold* to him by the corporation, but *furnished* him by the steward upon his paying into the common fund the cost of the article *furnished.*"[9] This view is unsound because it assumes the title to corporate property is in the members of the club and not in the corporation. The same is true of the following extract: "Club buys the liquors and distributes them to members who pay for what they drink. They are *all* owners of the property in equal shares when purchased. Some drink; some do not. The one who drinks the others' shares puts back the value of these shares in the common treasury, for they are all owners of the property in equal shares when purchased. Therefore, the distribution is made equal by contribution. This does not constitute a sale. There is no element of bargain; only a method of distribution of common property."[10]

There are cases in which the decisions of the courts are based on the idea that a bona fide social club was not a public place within the meaning of statutes prohibiting the sale of liquor in public places or as a business.[11]

*In State v. Warcholik*,[12] the court said that, granting for the moment that a sale may be made to a member, it cannot be made to a non-member without a license, though the sale was made in the bona fide belief that the man was a member.

It would seem that both the cases cited in the beginning are correctly decided.

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[8] *State v. Nurdie*, 115 N. W. (S. Dak.) 107.

[9] *Leim v. State*, 55 Md. 566.

[10] *Klein v. Livingston Club*, 177 Pa. St. 224.

[11] *Grant v. State*, 33 Tex. Cr. R. 527; *State v. Austin Club*, 89 Tex. 20; *Manassas Club v. City*, 121 Ala. 561.

[12] 80 Conn. 351.